Supreme Court, U.S.
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No. 93-1071

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

PATRICIA A. MERTENS - - - - Petitioner

versus

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually and in his official capacity;
HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, individually and in his official capacity;
THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity;
FRANK WILLEY, (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity - - - - - - - - Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Kentucky's narrowly tailored patronage practice impermissibly discriminate against the Petitioner where (1) such practice furthers a vital government interest by the selection or retention for a significant, unclassified high-level policy-making and supervisory position in the state government system of only such person who will loyally and effectively further the goals and implement the policies for which an administration was duly elected; (2) the Petitioner fails to demonstrate by facts alleged in any pleading (a) what activity or conduct she undertook which constitutes speech protected by the First Amendment, (b) that this activity or conduct was a substantial factor in the decision not to retain her in such policy-making position, (c) that the motive or intent of any Respondent in not retaining her in such position was to deprive her of the right to such speech, and (d) that by statute, regulation or the terms of her appointment by a previous administration she had any entitlement or interest to the policy-making position protected by the Fourteenth Amendment to continued employment or reemployment in such position in a new administration; and (3) such defective pleading does not give fair notice to Respondents of the precise nature of the claims against them?

2. Does this Court's qualified immunity jurisprudence require a heightened pleading in 42 U.S.C. § 1983 cases involving individual government officials?

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No. 93-1071

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PATRICIA A. MERTENS - - - - - - - *Petitioner*

v.

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually and in his official capacity;
HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, individually and in his official capacity;
THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity;
FRANK WILLEY, (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity - - - - - *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Supreme Court of Kentucky rendered September 30, 1993, in Case No. 90-SC-778-DG. The Memorandum Opinion of the Court in that case is not to be published.

COUNTERSTATEMENT OF THE CASE

Respondents agree in substance with Petitioner's procedural history of the case.

On April 1, 1987, Petitioner was appointed, pursuant to Kentucky Revised Statutes (hereinafter "KRS") 12.050, as the Division Director of Child Support Enforcement in the Department for Social Insurance of the Kentucky Cabinet for Human Resources, an agency of the executive branch of government of the Commonwealth of Kentucky created by KRS Chapter 194 to develop and administer health, welfare and human services programs for the citizens of Kentucky. There was no employment contract involved in her appointment as Division Director.

By statute [KRS 18A.115(i)] the position of Division Director is unclassified, unless certified for classification pursuant to KRS 18A.170. Petitioner admitted in her complaint that she was an unclassified employee. She confirms such admission in the Petition for Writ of Certiorari.

In accordance with an implementing regulation, 101 Kentucky Administrative Regulation 3:050(3), an employee in an unclassified position such as Division Director is subject to dismissal upon written notice by the appointing authority ". . . for cause, or without cause." Petitioner admitted in her complaint that her dismissal from the position of Division Director on January 22, 1988, was "without cause."

On January 20, 1989, Petitioner filed this action pursuant to 42 USC § 1983 in the Franklin Circuit Court, alleging violation of her constitutional rights under the First and Fourteenth Amendments. Specifically, she alleged in her original complaint that "a substantial or motivating factor . . . or the sole reason for the discharge of plaintiff by defendant . . . was her political beliefs."

The Franklin Circuit Court dismissed the original complaint with leave to amend "to state non-conclusory allega-

tions of evidence of constitutional motive or intent." In her amended complaint Petitioner alleged "unconstitutional motive and intent." However, the Franklin Circuit Court dismissed the amended Complaint for failure "to state a claim in terms of facts rather than conclusions . . . ." Petitioner's motion to reconsider such dismissal was denied. Petitioner appealed.

The Kentucky Court of Appeals decision on that appeal was in three parts. First, the appellate court upheld the circuit court's dismissal of Petitioner's action for damages against the individual defendants in their official capacity, while holding that an action for injunctive relief against defendants was proper under § 1983.

The Court of Appeals then analyzed the statutory scheme and held that Petitioner's only option in appealing a dismissal without cause was an action in Franklin Circuit Court; Respondents' argument that Petitioner failed to exhaust administrative remedies was held to be without merit. The state court action was not, however, merely an appeal of the dismissal, but was also a separate action under 42 USC § 1983.

In the third part of its decision the Court of Appeals held that "[t]he requirements for asserting constitutional deprivations in § 1983 claims are the same for [sic] those establishing the underlying constitutional violations." Although the Petitioner asserted deprivation of freedom of speech, the Court of Appeals held she failed to assert "any conduct, speech, or belief that was constitutionally protected, nor [did she show] that the Respondents decided to dismiss her because of any such conduct." On this basis the Court of Appeals upheld dismissal of the amended complaint for failure to state a claim.

The Supreme Court of Kentucky granted discretionary review, and on January 16, 1992 affirmed the Court of Appeals. In pertinent part the Supreme Court held:

It is clear that the First Amendment forbids discharge of public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. *Rutan* v. *Illinois*, ___U.S.___, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), *Branti* v. *Finkel, supra; Elrod* v. *Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Moreover, the U.S. Supreme Court stated in *Rutan* that a government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high level employees on the basis of their political views. S.Ct. at 2737, L.Ed.2d at 66, citing *Elrod* v. *Burns, supra*.

We believe it is clear that Metens' position, Division Director of Child Support Enforcement, is a significant, high-level position in the state government system. Only the Commissioner for Social Insurance and the Secretary of the Cabinet for Human Resources are closer to the Governor in the ranking system. It also involves supervisory duties of more than two hundred employees. The civil service laws embodied in Kentucky's statutory system clearly define the position as "policy-making." Division directors who are considered policy makers are not certified. If a division director disagrees, a hearing is held. The Division Director of Child Support Enforcement is not a certified position. Clearly, it is in choosing or dismissing individuals at this high-level of service that enables an administration to further the goals and implement the policies for which it was elected.

There is not merit in Mertens' contention that *Branti* v. *Finkel, supra*, compels a different result. The plaintiffs in Branti held only entry level positions. None of the political patronage cases cited by Mertens dealt with high level office involved here.

As to a heightened pleading requirement for § 1983 actions, the Kentucky Supreme Court held:

> Pleading in federal courts, as in this Commonwealth, is notice pleading. It is only in actions brought pursuant to § 1983, where motive is the issue, that heightened pleading standards are mandated. The mere fact that state court claims do not require pleading with specificity is totally irrelevant to the issue of a § 1983 pleading.

On March 8, 1993, a petition for writ of certiorari was granted, the foregoing judgment of the Kentucky Supreme Court was vacated and the case was remanded for further consideration in light of *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Memorandum Decision, ___U.S.___, 113 S.Ct. 1407, 122 L.Ed.2d 779 (1993).

On remand, in an unpublished Memorandum Opinion rendered on September 30, 1993, the Supreme Court of Kentucky again affirmed the dismissal of Petitioner's complaint. After observing in dicta that "it would appear" the holding in *Leatherman, supra,* that there is no heightened pleading standard in § 1983 municipal liability actions, "applies to all § 1983 cases," the Kentucky Supreme Court held that the trial court and the Kentucky Court of Appeals were correct in dismissing Petitioner's complaint because "[s]ufficient reason does exist under the application of appropriate and longstanding Kentucky principles of civil procedure for notice pleading to sustain the dismissal."

Citing *Rutan* v. *Illinois,* 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d. 52 (1990); *Branti* v. *Funkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Elrod* v. *Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); and *Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), as well as other federal and state cases and applicable state statutes and regulations, the Kentucky Supreme Court concluded that the position from which Petitioner was

dismissed was "a significant, high-level" unclassified position, and that the selection or dismissal of persons at that level was proper because it "enables an administration to further the goals and implement the policies for which it was elected", and because there were no allegations in Petitioner's complaint sufficient under even "the most liberal construction of notice pleading" to demonstrate what activity or conduct was undertaken by Petitioner which constituted speech protected by the First Amendment. The Court further held that the pleadings were not adequate to give Respondents fair notice as to whether such activity or conduct was a substantial factor in the decision not to retain Petitioner as a Division Director, and whether the motive or intent of any Respondent in removing Petitioner from that position was to deprive her of such protected speech. The Court also held that Petitioner had failed to demonstrate in her pleading that she had any entitlement to or property or liberty interest under State law or the terms of her appointment in the Division Director position that was protected by the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

I. The Decision of the Kentucky Supreme Court is Correct Without Regard to the Questions Sought to be Raised by the Petition for Writ of Certiorari.

In denying Petitioner's claims, the Kentucky Supreme Court properly applied the principles of *Rutan, supra; Branti, supra; Elrod* v. *Burns, supra;* and *Mt. Healthy, supra,* in holding that Kentucky has a vital interest in being able to choose or dismiss high-level policy-making officials in Petitioner's position as a Division Director on the basis of their political views, and that the state's narrowly tailored patronage practice which is set out in the state statutes and regulations did not impermissibly discriminate against the Petitioner when she was removed

from such a position by a new administration which had been duly elected.

The Kentucky Supreme Court also properly applied recognized state and federal notice pleading principles in ruling that Petitioner failed to give Respondents fair notice of the precise nature of the claims against them, and failed to state a claim upon which any relief could be granted under 42 U.S.C. § 1983.

Since the Kentucky Supreme Court fully considered and correctly decided these issues based on an unbroken line of authority established by this Court, there is no real conflict on the same matter of law and fact between the decision of the Kentucky Supreme Court and any decision rendered by this Court or some lower court whose judgment may be final in the absence of United States Supreme Court review. Therefore, there is clearly no basis or need for their review on a writ of certiorari. Accordingly, the writ should be denied.

II. The Decision of the Kentucky Supreme Court Affects No One Other Than the Parties to That Action.

By operation of Rule 76.28(4) of the Kentucky Rules of Civil Procedure, the unpublished Memorandum Opinion rendered on September 30, 1993, which the Kentucky Supreme Court designated "Not To Be Published," cannot be cited or used as authority in any other case in any court in the Commonwealth of Kentucky. The Kentucky Rules of Civil Procedure were prescribed by the Kentucky Supreme Court under the rule-making power granted by Section 116 of the Kentucky Constitution. Except for special statutory proceedings, not applicable here, these rules govern procedure and practice in all actions of a civil nature in all state courts in Kentucky. Rule 1(2), Ky.R.Civ.P.

Rule 76.28(4) provides in pertinent part:

CR 76.28 Opinions

. . . .

(4) Publication.

(a) . . . . Every opinion shall show on its face whether it is "To Be Published" or "Not To Be Published."

. . . .

(c) Opinions that are not to be published shall not be cited or used as authority in any other case in any court of this state."

The constitutionally of the foregoing prohibition against the citation as authority of an unpublished opinion in another case was recently addressed in *Goodlet* v. *Commonwealth of Kentucky*, 825 S.W.2d 290 (Ky.App. 1992). In that case the Kentucky Court of Appeals held that the practice of appellate courts in rendering unpublished opinion, combined with the bar to citation to such opinions, set out in Rule 76.28(4), did not deprive the defendant therein of either due process or equal protection under the U.S. or State Constitutions. In an earlier opinion, the Kentucky Court of Appeals had held that even though an unpublished opinion cannot be cited as authority in another case, it is the law of the case where it is rendered and may be cited in that case for that purpose. *Penco* v. *Detrex Chemical Industries*, 672 S.W. 2d 948 (Ky.App. 1984).

Since the Memorandum Opinion which is the subject of the instant petition for writ of certiorari cannot be cited or otherwise used as authority in any other case, the questions sought to be raised by the petition for writ of certiorari are of importance only to the parties to that action and not of sufficient general importance for review by this Court. Therefore, the petition should be denied.

III. There is no Conflict Between Decisions of the United States Courts of Appeals on the Matter of a Heightened Pleading Standard as set out in the Questions Sought to be Raised by the Petition for Writ of Certiorari.

In what is clearly dicta, the Supreme Court of Kentucky stated in its unpublished Memorandum Opinion rendered on September 30, 1993, that it interpreted the holding in *Leatherman, supra,* that there is no heightened pleading standard in § 1983 municipal liability actions, as being applicable "to all § 1983 cases. . . . Petitioner would have this Court review that observation.

However, upon review of the United States Courts of Appeals decisions cited and discussed by the Petitioner, including *District Council 47* v. *Bradley,* 795 F.2d 310 (3d Cir. 1986), and *Hobson* v. *Wilson,* 737 F.2d 1 (D.C.Cir. 1984), *cert. denied,* 105 S.Ct. 1843 (1985), as well as others that have addressed the issue of a heightened pleading standard in non-municipal liability cases, it is clear there is no real conflict between those decisions. All require that a civil rights plaintiff meet a stricter or heightened standard of pleading when qualified immunity is implicated in the complaint. Furthermore, this Court in *Leatherman, supra,* 113 S.Ct. at 1162, unanimously indicated it had "no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials."

The most recent of these courts of appeals decisions is *Kimberlin* v. *Quinlan,* 6 F.2d 789, 793-5 (D.C.Cir. 1993) (*Bivens* action, where with one concurring judge, 6 F.2d at 798-9, the Court cites *Hobson* v. *Wilson, supra,* and holds that a "heightened pleading" standard applies where subjective intent is an element of the underlying constitutional claim). Other decisions include *Correa-Martinez* v. *Arrillaga-Belendez,* 903 F.2d 49, 52-3 (1st Cir. 1990) (the dismissal of a civil rights forced resignation complaint for

failure to state claim was affirmed where the alleged facts did not outline facts sufficient to specifically identify discriminatory animus); *Polur* v. *Raffe,* 912 F. 2d 52, 56 (2nd Cir. 1990) (plaintiff must state more than conclusionary allegations to avoid dismissal of civil rights claim arising out of alleged conspiracy); *Rose* v. *Bartle,* 871 F.2d 331, 353-4 (3rd Cir. 1989) (citing *Bradley, supra,* a Title VII case which applied a stricter pleading standard, but found it satisfied, the Court reaffirmed that civil rights complaints must plead facts with greater specificity than mere notice pleading to survive dismissal); *Dunbar Corp.* v. *Lindsey,* 905 F.2d 754, 763-4 (4th Cir. 1990) (finding a "heightened pleading" standard appropriate in civil rights actions against government officials); *Jackson* v. *City of Beaumont Police Dep't.,* 958 F.2d 616, 620 (5th Cir. 1992) (§ 1983 plaintiffs must meet a "heightened pleading" requirement where an immunity defense can be raised); *Nuclear Transport & Storage, Inc.* v. *U.S.,* 890 F.2d 1348, 1354-5 (6th Cir. 1989), *cert. denied,* 110 S.Ct. 1807 (1989), (complaint attempting to state a *Bivens* claim against individual defendants is subject to the same "heightened pleading requirements applied under 42 U.S.C. § 1983, as in the case of *Chapman* v. *City of Detroit,* 808 F.2d 459 (6th Cir. 1986), which held, 808 F.2d at 465, that a civil rights complaint against governmental officials for money damages must contain more than conclusionary allegations); *Elliott* v. *Thomas,* 937 F.2d 338, 344-5 (7th Cir. 1991) (citing and quoting from *Siegert* v. *Gilley,* ___U.S.___, 111 S.Ct. 1789, 1795, 114 L.Ed.2d 277 (1991), Kennedy, J., concurring, the Court opined that a defendant prevails on immunity grounds if the plaintiff does not plead "'specific, nonconclusionary factual allegations which establish [the necessary mental state] . . . .'" *See also Cohen* v. *Illinois Institute of Technology,* 581 F.2d 658, 663 (7th Cir. 1978); *Arnold* v. *Jones,* 891 F.2d 1370, 1373 n.3 (8th Cir. 1989) (damages actions against government officials are subject to a "heightened pleading"

standard); *Branch* v. *Tunnell*, 937 F.2d 1382, 1386-7 (9th Cir. 1991), affirmed in pertinent part in later proceeding, 1994 U.S.App.LEXIS 409 (January 12, 1994) (a district court must apply a "heightened pleading" standard in Bivens or § 1983 cases where a defendant's subject intent is an element of the alleged constitutional violation); *Dunn* v. *White*, 880 F.2d 1188, 1198 (10th Cir. 1989) (plaintiff must plead specific, not conclusionary allegations in § 1983 action seeking damages); and *Oladeinde* v. *City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992) (applying a "heightened specifically" requirement of Rule 8, F.R.Civ.P., in a § 1983 case where the qualified immunity defense raised under Rule 12(b)(6), F.R.Civ.P., motion to dismiss).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

[EXCERPTS FROM KENTUCKY REVISED STATUTES]

12.050. Deputy heads of departments and directors of divisions and institutions.—Unless otherwise provided by law, deputy heads of departments, and directors of divisions and institutions shall be appointed by the heads of the departments and in statutory departments the appointment of deputy heads of departments, and heads of divisions shall be with the prior written approval of the Governor. In departments each division head shall report to the head of the department to which the division is assigned. (4618-154, 4618-155: amend. Acts 1948, ch. 228; 1950, ch. 123, § 29; 1974, ch. 74, Art. I, § 13; 1982, ch. 393, § 6, effective July 15, 1982.)

* * * * *

18A.005. Definitions for KRS 18A.010 to 18A.200.—

As used in this chapter, unless the context indicates otherwise:

(1) "Appointing authority" means the agency head or any person whom he has authorized by law to designate to act on behalf of the agency with respect to employ appointments, position establishments, payroll documents, register requests, waiver requests, requests for certification or other position actions. Such designation shall be in writing and signed by both the agency head and his designee. Prior to the exercise of appointing authority, such designation shall be filed with the commissioner;

* * * * *

(3) "Board" means the personnel board created by KRS 18A.045;

* * * * *

(7) "Classified service" includes all the employment subject to the terms of this chapter except for those positions

expressly cited in KRS 18A.115; a "classified position" is a position in the classified service;

• • • • •

(17) "Penalization" shall include, but not be limited to, demotion, dismissal, suspension, fines and other disciplinary actions, involuntary transfers; salary adjustments; any action that diminishes the level, rank, discretion or responsibility of an employee without proper cause, including a reclassification or reallocation; and the abridgement or denial of other rights granted to state employes;

(18) "Position" means an office or employment in an agency (whether part-time, full-time, permanent, temporary, seasonal, federally funded time-limited, or emergency, occupied or vacant) involving duties requiring the services of one (1) person;

• • • • •

(31) "Status" means the acquisition of tenure with all rights and privileges granted by the provisions of this chapter after satisfactory completion of the initial probationary period by an employe in the classified service;

• • • • •

(Repealed, reenact, and amend. 1982, ch. 448, § 1, effective July 15, 1982; 1986, ch. 494, § 7, effective July 15, 1986; 1988, ch. 129, § 1, effective July 15, 1988; 1988, ch. 203, § 1, effective July 15, 1988.)

• • • • •

18A.115. Employment exempted from classified service—Reversion rights of career employees promoted outside classified service.—

(1) The classified service to which KRS 18A.005 to 18A.200 shall apply shall compromise all positions in the state service now existing or hereafter established, except the following:

• • • • •

(i) Division directors subject to the provisions of KRS 18A.170. Division directors in the classified service as of

January 1, 1980, shall remain in the classified service;

* * * * *

(2) Nothing in KRS 18A.005 to 18A.200 is intended, or shall be construed, to alter or amend the provisions of KRS 150.022 and 150.061.

(3) Nothing herein is intended or shall be construed to affect any non-management, nonpolicy-making position which must be included in the Classified service as a prerequisite to the grant of federal funds to a state agency.

* * * * *

(5) Nothing herein shall be constructed as precluding appointing officer from filling unclassified positions in the manner in which positions in the classified service are filled except as otherwise provided herein. (Enact. Acts 1982, ch.52, § 1, effective July 15, 1982; 1982, ch. 393, § 12, effective July 15, 1982; repealed, reenacted and amended by 1982, ch. 448, §23, effective July 15, 1982; 1984, ch. 253, effective July 13, 1984; 1984 ch. 350, § 10, effective July 13, 1984; 1986, ch. 494, § 18, effective July 15, 1986.)

* * * * *

18A.170. Certification of division directors who do not make policy.—It is further provided that the responsible department, board, commission or agency head shall at the time as which he elects to come under the provisions of KRS 18A.005 to 18A.200, certify to the board the positions of those division directors or heads under their jurisdiction whose duties are nonpolicy making together with a sufficient statement of their duties to enable to board to determine whether or not, as a matter of fact, such duties are nonpolicy making in their nature. He shall, at any time subsequent to coming under the provisions of KRS 18A.005 to 18A.200 certify to the board additional division directors or heads whose duties are nonpolicy making. At the time of certification notice thereof shall be given to the interested division director or head in the form of a copy of the statement certifying the duties of his office. The board may conduct such hearings as it may deem necessary, and

shall conduct hearing pursuant to the administrative provisions of KRS 18A.095 in the event of a difference of opinion between the certifying officer and the interested division director or head, before entering its findings of fact and the final order of the board by initiating action in the Franklin Circuit pursuant to the provisions of KRS 418.040 et seq. (Repealed, reenact. and amend. 1982, ch. 448, § 34, effective July 15, 1982.)